Supreme Court, U.S.
FILED
APR 3
CLERK

(3)

No. 99-1279

IN THE

# Supreme Court of the United States

B.S. and L.S.,

*Petitioners,*

*v.*

THE WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION THREE

## BRIEF IN OPPOSITION FOR RESPONDENT MILDRED STALEY, GUARDIAN AD LITEM FOR HANNAH SWENSON

FRANK R. HOOVER
*Counsel of Record*
GEORGE M. AHREND
*Attorneys for Respondent Mildred Staley, Guardian ad Litem for Hannah Swenson*
1402 West Broadway Avenue
Spokane, WA 99201-1902
(509) 328-8300

158903

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

24pp

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Table of Cited Authorities | ii |
| Restatement of the Case | 1 |
| A. Washington's parental termination law. | 1 |
| B. The termination of Brent and Lorilei Swenson's parental rights. | 4 |
| Reasons for Denying the Writ | 7 |
| A. Because the best interests of the child cannot serve as the basis for termination of parental rights in Washington, a lower standard of proof than that required for termination conforms to the principles delineated in *Santosky v. Kramer.* | 8 |
| B. Because pre-termination dependency orders are temporary, limited, and subject to periodic judicial review, a lower standard of proof than that required for termination of parental rights conforms to the principles delineated in *Santosky v. Kramer.* | 12 |
| C. Washington's parental termination law is not unconstitutionally vague. | 14 |
| Conclusion | 17 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Caven v. Caven*, 136 Wash. 2d 800, 966 P.2d 1247 (1998) ..... 9

*In re AJR*, 78 Wash. App. 222, 896 P.2d 1298, *rev. denied*, 127 Wash. 2d 1025, 904 P.2d 1157 (1995) ..... 4

*In re Aschauer*, 93 Wash. 2d 689, 611 P.2d 1245 (1980) ..... 4, 14, 17

*In re Ashley A.*, 679 A.2d 86 (Me. 1996) ..... 11

*In re AVD*, 62 Wash. App. 562, 815 P.2d 277 (1991) ..... 4, 8, 9

*In re AW*, 53 Wash. App. 22, 765 P.2d 307 (1988) ..... 3

*In re Boursaw*, 2000 WL 294190 (Mich. App., Mar. 17, 2000) ..... 11

*In re CB*, 79 Wash. App. 686, 904 P.2d 1171 (1995), *rev. denied*, 128 Was. 2d 1023 (1996) ..... 14

*In re DT*, 237 N.W.2d 166 (S.D. 1975) ..... 17

*In re Elijah R.*, 620 A.2d 282 (Maine 1993) ..... 10, 11

*Cited Authorities*

*Page*

*In re Gentry*, 369 N.W.2d 889 (Mich. App. 1985) ..... 17

*In re Gonzales*, 933 P.2d 198 (Nev. 1997) ..... 10, 11

*In re GV*, 685 N.E.2d 406 (Ill. App. 1997) ..... 11

*In re HW*, 92 Wash. App. 420, 961 P.2d 963 (1998) ..... 9

*In re JC*, 130 Wash. 2d 418, 924 P.2d 21 (1996) ..... 3, 12, 13

*In re JZ*, 190 N.W.2d 27 (N.D. 1971) ..... 17

*In re Kimberly*, 609 N.E.2d 73 (Mass. 1993) ..... 10, 11

*In re KR*, 128 Wash. 2d 129, 904 P.2d 1132 (1995) ..... 3, 12

*In re Maricopa County Juvenile Action No. JS-5209*, 692 P.2d 1027 (Ariz. 1984) ..... 10

*In re Metteer*, 279 N.W.2d 374 (Neb. 1979) ..... 17

*In re MGM*, 654 P.2d 994 (Mont. 1982) ..... 10

*In re Ramquist*, 52 Wash. App. 854, 860, 765 P.2d 30 (1988), *rev. denied*, 112 Wash. 2d 1006 (1989) ..... 4, 8, 9

*Cited Authorities*

*Page*

*In re Sego*, 82 Wash. 2d 736, 513 P.2d 831 (1973) ..... 2

*In re SVB*, 75 Wash. App. 762, 880 P.2d 80 (1994) ..... 4

*King County Council-v. Public Disclosure Comm'n*, 93 Wash. 2d 559, 611 P.2d 1227 (1980) ..... 9

*Krause v. Catholic Community Servs.*, 47 Wash. App. 734, 737 P.2d 280, *rev. denied*, 108 Wash. 2d 1035 (1987) ..... 3

*New Mexico ex rel. Health & Social Servs. Dep't v. Natural Father*, 598 P.2d 1182 (N.M. App. 1979) ..... 17

*Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) ..... 7, 8, 10, 12, 13, 17

**Statutes:**

Ariz. Rev. Stat. § 8-533(B) ..... 11

Mass. Gen. Laws Ann. Ch. 210, § 3(c) ..... 11

Wash. Rev. Code § 26.44.020(12) ..... 16

Wash. Rev. Code § 13.34.030(2) ..... 1

Wash. Rev. Code § 13.34.030(4)(b) ..... 16

*Cited Authorities*


| | *Page* |
|---|---|
| Wash. Rev. Code § 13.34.130 | 2, 13 |
| Wash. Rev. Code § 13.34.130(5) | 2 |
| Wash. Rev. Code § 13.34.150 | 13 |
| Wash. Rev. Code § 13.34.180 | 7 |
| Wash. Rev. Code § 13.34.180(1) | 1, 2, 12 |
| Wash. Rev. Code § 13.34.180(2) | 2 |
| Wash. Rev. Code § 13.34.180(3) | 2 |
| Wash. Rev. Code § 13.34.180(4) | 2 |
| Wash. Rev. Code § 13.34.180(5) | 2, 3, 4 |
| Wash. Rev. Code § 13.34.180(5)(a) | 15 |
| Wash. Rev. Code § 13.34.180(5)(b) | 3, 15 |
| Wash. Rev. Code § 13.34.180(6) | 2 |
| Wash. Rev. Code § 13.34.190 | 7, 9 |
| Wash. Rev. Code § 13.34.190(1) | 2 |
| Wash. Rev. Code § 13.34.190(1)(a) | 9 |
| Wash. Rev. Code § 13.34.190(2) | 9 |
| Wash. Rev. Code § 130.34.190(4) | 4 |

*Cited Authorities*

*Page*

**United States Constitution:**

Fourteenth Amendment ..... 7

This brief in opposition to the Petition for a Writ of Certiorari is filed on behalf of Mildred Staley, Guardian ad Litem for Hannah Swenson.

## RESTATEMENT OF THE CASE

Brent and Lorilei Swenson were not able to take care of their daughter when she was born, by their own admissions, and they remained unable to care for her four years later when parental termination proceedings were held. Nonetheless, they sought to prolong their daughter's sojourn in foster care indefinitely and preserve their parental rights, presumably in the hope that they could somehow develop parenting skills necessary for their daughter's physical and mental health and well being, and despite the fact that they had been unable to develop those basic parenting skills in the previous four years. The trial court properly terminated the Swensons' parental rights under these circumstances, and the Washington Court of Appeals properly affirmed that decision. Having exhausted their state court appeals, Brent and Lorilei Swenson now attempt to characterize Washington's parental termination law as unconstitutional.

### A. Washington's parental termination law.

Termination of parental rights cannot occur in Washington until a child is first found to be "dependent." Wash. Rev. Code § 13.34.180(1); Wash. Rev. Code § 13.34.030(2). The grounds for dependency include abandonment, or parental abuse or neglect. Wash. Rev. Code § 13.34.030(2). Following a determination of dependency, the child may be placed in foster care or with a relative, while the parents are given an opportunity to correct the grounds for dependency with the support of social service

agencies and health care providers. Wash. Rev. Code § 13.34.130. The dependency is reviewed periodically to determine whether grounds for dependency persist. Wash. Rev. Code § 13.34.130(5). Because the dependency does not entail a termination of parental rights, the grounds for dependency must be proved only by a preponderance of the evidence. Wash. Rev. Code § 13.34.130.

If the dependency persists more than six months after the child is placed in foster care or with a relative, the State may initiate termination proceedings. Wash. Rev. Code § 13.34.180(1-3). Termination of parental rights may be ordered upon proof that: "all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided[,]" Wash. Rev. Code § 13.34.180(4); "there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future[,]" Wash. Rev. Code § 13.34.180(5); and "continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home[,]" Wash. Rev. Code § 13.34.180(6). Each of these requirements must be proved by "clear, cogent, and convincing evidence." Wash. Rev. Code § 13.34.190(1). "Clear, cogent, and convincing evidence" exists when the ultimate fact in issue is shown by the evidence to be "highly probable." *In re Sego*, 82 Wash. 2d 736, 739, 513 P.2d 831 (1973) (quotation omitted).

Although dependency is a prerequisite to termination, the termination does not rest on the original grounds supporting the dependency. The parental termination statute does not require relitigation of the original grounds for

dependency, *In re JC*, 130 Wash. 2d 418, 428, 924 P.2d 21, 26 (1996), and the determination of dependency does not have res judicata effect in termination proceedings, *In re KR*, 128 Wash. 2d 129, 144-145, 904 P.2d 1132 (1995).

Termination "necessarily" requires clear, cogent and convincing evidence of "current parental unfitness." *In re KR*, 128 Wash. 2d 129, 142, 904 P.2d 1132 (1995); *accord Krause v. Catholic Community Servs.*, 47 Wash. App. 734, 742, 737 P.2d 280, *rev. denied*, 108 Wash. 2d 1035 (1987) (stating "[t]he termination decision must be predicated upon present parental unfitness."). This follows from the statutory requirement of proof by clear, cogent, and convincing evidence that "there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future[,]" Wash. Rev. Code § 13.34.180(5). *Krause*, 47 Wash. App. at 742, 737 P.2d 280; *In re AW*, 53 Wash. App. 22, 28-29, 765 P.2d 307 (1988).

The "conditions" establishing current parental unfitness are expressly defined to include:

> Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future[.]

Wash. Rev. Code § 13.34.180(5)(b). Conditions establishing parental unfitness are not limited to the statutorily defined

circumstances, Wash. Rev. Code § 13.34.180(5), in order to reflect the broad array of circumstances giving rise to parental termination proceedings, *In re Aschauer*, 93 Wash. 2d 689, 695, 611 P.2d 1245 (1980).

If termination is otherwise appropriate, and the requisite degree of proof is before the court, the court may nonetheless deny the termination of parental rights if not in the best interests of the child. Wash. Rev. Code § 130.34.190(4). The best interests of the child cannot serve as a basis to terminate parental rights, only as a basis to deny termination. *In re Ramquist*, 52 Wash. App. 854, 860, 765 P.2d 30 (1988), *rev. denied*, 112 Wash. 2d 1006 (1989); *In re AVD*, 62 Wash. App. 562, 571, 815 P.2d 277 (1991). Because it cannot serve as a basis for termination, the best interests of the child may be proved by a preponderance of the evidence. *Ramquist*, 52 Wash. App. at 860, 765 P.2d 30; *AVD*, 62 Wash. App. at 571, 815 P.2d 277; *In re SVB*, 75 Wash. App. 762, 775-776, 880 P.2d 80 (1994); *In re AJR*, 78 Wash. App. 222, 228, 896 P.2d 1298, *rev. denied*, 127 Wash. 2d 1025, 904 P.2d 1157 (1995).

**B. The termination of Brent and Lorilei Swenson's parental rights.**

Hannah Swenson was born on November 25, 1992. Within three weeks after her birth, she was placed into foster care at the request of her parents. She was subsequently found dependent, with the agreement of her parents, based on her mother's expression of improper sexual urges toward her, serious malnourishment and weight loss leading to a clinical diagnosis of "failure to thrive," and emotional instability precipitated by both parents' psychiatric disabilities, among other things.

During the dependency, serious parental deficiencies persisted. Periodic court review established that the dependency should continue, a conclusion with which Brent and Lorilei Swenson agreed at various times. (Pet. for Cert., App. C-11 to C-12.) As noted by the Washington Court of Appeals, "[t]he records of the final dependency review and termination hearings contain exhaustive expert testimony that the problems giving rise to the dependency remain unresolved." *Termination of Swenson*, No. 17264-3-III, slip op., at pp. 3-4 (Wash. App., Div. III, Mar. 9, 1999).

The trial court specifically found, by clear, cogent and convincing evidence, that Brent and Lorilei Swenson were unfit parents at the time of the termination hearing:

> The parents are unable to parent this child with little or no likelihood of change in the near and foreseeable future. There is little likelihood that conditions will be remedied so that the child could be returned to the parents in the near future.

(Pet. for Cert., app. C-7.) The trial court based its finding on the fact that Brent and Lorilei Swenson's "chronic mental health issues interfere with [their] ability to meet the child's physical, emotional and developmental needs." Brent Swenson suffers from severe schizophrenia and depression requiring electro-shock therapy and quantities of antipsychotic medication sufficient to incapacitate a healthy person. (Pet. for Cert., App. C-7 to C-8.) Lorilei Swenson suffers from schizophrenia and consumes a similar amount of antipsychotic medication, although she refuses to believe that she suffers from the illness. (Pet. for Cert., App. C-7 to C-8.) Their illness renders both parents unable to cope with the stress of raising a child. (Pet. for Cert., App. C-7.)

They cannot properly respond to problems or challenges confronted in "the daily course of parenthood." (Pet. for Cert., App. C-9.)

The trial court's findings were born out during the dependency and termination proceedings. "Extensive visitation opportunities" were provided during the dependency and, without fail, visitation had to be reduced by court order based on the Swensons' stress and the harm they caused to their daughter's "health, safety and welfare." (Pet. for Cert., App. C-9 to C-10.)

Even the expert witness originally retained by the Swensons opined that termination was warranted in this case. The trial court noted:

> The parents proposed Pam Aden, MS, as a provider. She has extensive experience working with parents and children; her goal was to facilitate reunification. Although Ms. Aden was intent on facilitating reunification, she concluded after ten to twelve sessions that the parents could not fulfill Hannah's needs then or in the future. The parents terminated her involvement.

(Pet. for Cert., App. C-5.)

The Swensons' received every opportunity to remedy their parental deficiencies without significant result. As noted by the Washington Court of Appeals after reviewing the record, "this case has been saturated with services from the beginning." *Swenson*, slip op., at p. 9. The trial court found that the Swensons "were only marginally amenable" to social services and cooperated with social service providers only

"intermittently." (Pet. for Cert., App. C-4.) "The record is replete with testimony that [Brent and Lorilei Swenson] have not benefited from the available parenting services and are unlikely to improve in the foreseeable future." *Swenson*, slip op., at p. 18 (brackets added.)

Up to the present time, more than six years after the Swensons gave up their daughter, this case has involved the efforts of four Department of Child and Family Services caseworkers and three guardians ad litem. It has involved evaluation and treatment by more than 20 service providers. It has been reviewed by eight judicial officers in the trial court and a panel of the Washington Court of Appeals. There is no need for additional review by this Court which would only serve to further postpone the development of a stable and permanent home for Hannah Swenson because this case involves nothing more than factual disputes among the litigants.

## REASONS FOR DENYING THE WRIT

Brent and Lorilei Swenson argue that the trial court failed to apply the correct standard of proof in terminating their parental rights. There is no dispute that the due process of clause of the Fourteenth Amendment to the U.S. Constitution requires proof of the grounds for termination of parental rights by "clear and convincing evidence," or an equal or greater standard of proof as adopted by the state. *Santosky v. Kramer*, 455 U.S. 745, 769-770, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). There is no dispute that, in accordance with the constitutional imperative, Washington's parental termination statute, Wash. Rev. Code § 13.34.180, requires proof of each element by an equivalent standard of "clear, cogent and convincing evidence," Wash. Rev. Code § 13.34.190. In addition, there is no dispute that the trial court in this case applied the proper burden of proof. In its

written opinion, the court stated that "[t]he elements of [the parental termination statute] have been met and proven by clear, cogent and convincing evidence." (Pet. for Cert., App. C-15.) The court further stated that it had "taken into consideration the applicable burdens of proof in making its determinations." (Pet. for Cert., App. C-15.)

The Swensons complain, however, that the trial court did not base its determination of the best interests of their child according to the clear and convincing standard of proof. The Swensons also complain that the original determination of dependency, which is a prerequisite to parental termination proceedings under Washington law, was not based on a clear and convincing standard of proof. Neither of these complaints is well founded because the U.S. Constitution and Washington law do not require the best interests of the child or the grounds for pre-termination dependency to be proved by anything other than a preponderance of the evidence.

**A. Because the best interests of the child cannot serve as the basis for termination of parental rights in Washington, a lower standard of proof than that required for termination conforms to the principles delineated in *Santosky v. Kramer*.**

The Swensons attempt to create a conflict between Washington law and this Court's decision in *Santosky* by wrongly implying that a trial court can terminate parental rights under Washington law based on the best interests of the child. (Pet. for Cert., at 22-24.) The implication is entirely wrong. Parental rights in Washington cannot be terminated based on the best interests of the child. *In re Ramquist*, 52 Wash. App. 854, 860, 765 P.2d 30 (1988), *rev. denied*, 112 Wash. 2d 1006 (1989); *In re AVD*, 62 Wash. App. 562, 571,

815 P.2d 277 (1991). The best interests of the child determination simply gives the court "discretion not to grant termination" even when the grounds for terminating parental rights have been proven by clear, cogent and convincing evidence. *Ramquist*, 52 Wash. App. at 860, 765 P.2d 30; *AVD*, 62 Wash. App. at 571, 815 P.2d 277.

Initially, under Washington's parental termination law, the court determines whether the grounds for termination of parental rights exist by clear, cogent and convincing evidence. Wash. Rev. Code § 13.34.190(1)(a). The court then determines whether termination is in the best interests of the child. Wash. Rev. Code § 13.34.190(2). "The six termination factors must be established to the requisite degree of certainty before the court may focus on the best interests of the child." *In re HW*, 92 Wash. App. 420, 425, 961 P.2d 963 (1998).

The relevant statutory language joins the grounds for termination of parental rights and the best interests of the child with the conjunction "and," Wash. Rev. Code § 13.34.190, indicating that both must be proven before the court may order termination, *see King County Council v. Public Disclosure Comm'n*, 93 Wash. 2d 559, 562, 611 P.2d 1227 (1980) (stating statutory requirements conjoined with "and" must all be satisfied). If the court could order termination based solely on the best interests of the child, the statutory requirements would have been joined with the conjunction "or" rather than "and." *See Caven v. Caven*, 136 Wash. 2d 800, 810, 966 P.2d 1247 (1998) (stating use of disjunctive "or" indicates that statutory elements are alternative). Linking the grounds for termination of parental rights with the best interests of the child in this manner means the best interests of the child can never serve as a basis for terminating parental rights, only as a basis for preventing termination.

Washington's approach to the determination of the best interests of the child is entirely consistent with *Santosky*. In *Santosky*, this Court recognized, when considering the grounds for termination of parental rights, both the parents and their child share the same "vital interest in preventing erroneous termination of their natural relationship." 455 U.S. at 760. Because the standard of proof reflects "societal judgment about how the risk of error should be distributed between the litigants," 455 U.S. at 755, a clear and convincing standard is necessary to vindicate the parents' and child's "vital interest." However, once clear and convincing proof of grounds to terminate parental rights has been adduced, "the interests of the child and the natural parents do diverge," 455 U.S. at 760, obviating the need for a heightened standard of proof.

The Swensons cite several cases outside of Washington for the proposition that the best interests of the child must be proved by clear and convincing evidence. (Pet. for Cert., at 24 (*citing In re Maricopa County Juvenile Action No. JS-5209*, 692 P.2d 1027 (Ariz. 1984); *In re Kimberly*, 609 N.E.2d 73 (Mass. 1993); *In re Elijah R.*, 620 A.2d 282 (Maine 1993); *In re MGM*, 654 P.2d 994 (Mont. 1982); and *In re Gonzales*, 933 P.2d 198 (Nev. 1997).) None of these cases involve parental termination laws comparable to Washington.

While the best interests of the child serve only as a basis to deny termination in Washington, the parental termination laws at issue in the cases cited by the Swensons define the grounds for termination of parental rights in terms of the best interests of the child. Because they define the grounds for termination of parental rights in these terms, the bests interests of the child are an essential component of the determination of parental unfitness that is the basis for termination. As a result, the best interests of the child are properly subject to the same, higher burden of proof that is required to prove termination of parental rights.

For example, the best interests of the child are not a separate determination from the grounds for termination of parental rights under the Arizona statute at issue in *Maricopa County Juvenile Action No. JS-5209*, 692 P.2d at 1038. *See* Ariz. Rev. Stat. § 8-533(B) ("in considering any of the following grounds [for termination of parental rights], the court shall also consider the best interests of the child"). Similarly, in *Kimberly*, 609 N.E.2d at 75, the court referred to the consideration of the best interests of the child and the grounds for termination of parental rights as "interrelated inquiries" under Massachusetts law. *See* Mass. Gen. Laws Ann. Ch. 210, § 3(c) (defining best interests of the child in terms of parents' fitness). *In re Ashley A.*, 679 A.2d 86, 89 (Me. 1996), the court clarified that the best interests of the child are not considered independently from the grounds for parental termination under the Maine statute at issue in *Elijah R.*, 620 A.2d at 284. In *Gonzales*, 933 P.2d at 202 & n.4, the court explained that consideration of the best interests of the child is part of the parental termination inquiry under the Nevada statute at issue in that case. Because of the important distinction between the role of the best interests of the child standard in Washington and in the cases cited by the Swensons, there is no conflict.

The Washington approach to the best interests of the child is similar to that followed in several states. *In re GV*, 685 N.E.2d 406 (Ill. App. 1997) (trial court has discretion to deny termination of parental rights in the best interests of the child, even if there is clear and convincing proof of parental unfitness); *In re Boursaw*, 2000 WL 294190 (Mich. App., Mar. 17, 2000) (notwithstanding proof of statutory grounds for termination of their parental rights by clear and convincing evidence, parents can prevent termination by producing evidence that best interests of the

child militate against the same). The approaches taken by each state may vary, and the approach taken dictates the extent to which the best interests of the child are subject to a clear and convincing standard of proof.[1]

**B. Because pre-termination dependency orders are temporary, limited, and subject to periodic judicial review, a lower standard of proof than that required for termination of parental rights conforms to the principles delineated in *Santosky v. Kramer*.**

The Swensons attempt to create a second conflict between Washington law and this Court's decision in *Santosky* by wrongly implying that the grounds for pre-termination dependency proceedings, subject to proof by a preponderance of the evidence, form the basis for later parental termination proceedings. (Pet. for Cert., at 20-22.) This implication is entirely wrong. As noted above, the parental termination statute does not require relitigation of the original grounds for dependency, *JC*, 130 Wash. 2d at 428, 924 P.2d 21, and the determination of dependency does not have res judicata effect in termination proceedings, *KR*, 128 Wash. 2d at 144-145, 904 P.2d 1132. Termination "necessarily" requires clear, cogent and convincing evidence of "current parental unfitness." *KR*, 128 Wash. 2d at 142, 904 P.2d 1132.

While it is true that the fact that a child has been declared "dependent" is one of the elements required for termination of parental rights, Wash. Rev. Code § 13.34.180(1), it is

1. In this regard, there is nothing in *Santosky* that requires states to follow any particular substantive standards beyond the basic requirement of proving parental unfitness. 455 U.S. at 760 n.10. This Court expressly recognized that "[t]he substantive standards applied vary from State to State." 455 U.S. at 769.

merely the "historic" fact of dependency that must be proved, *JC*, 130 Wash. 2d at 426, 924 P.2d 21. This ensures that the parents have been given every opportunity to remedy their unfitness with the benefit of every available support service that dependency proceedings entail.

As a practical matter, dependency proceedings often last, as they did in this case, for an extended period of time. It is inevitable that circumstances will change over time. The expected change in circumstances is recognized in several applicable statutory provisions. *E.g.*, Wash. Rev. Code § 13.34.150 (providing for modification of orders "upon a change in circumstances"). As long as parents remain unfit to care for their children at the time of termination proceedings, termination is appropriate regardless of the precise grounds on which that unfitness is based, and regardless of whether they are the same grounds that originally led to the initiation of dependency proceedings.

The Swensons essentially argue that dependency proceedings should be held to the same heightened standard of proof as termination proceedings. This is unwarranted because dependency proceedings are limited in duration, subject to periodic judicial review. They also involve relatively limited infringement of parental rights. For example, parents may retain residential custody of their children, or as in this case, visitation rights. *See* Wash. Rev. Code § 13.34.130. Nothing in this Court's decision in *Santosky* requires Washington's dependency proceedings to be held to a heightened standard of proof.

## C. Washington's parental termination law is not unconstitutionally vague.

Although the Swensons imply that Washington's parental termination law does not require a finding of current parental unfitness, as noted above, they seek to avoid the statutory language requiring such a finding by arguing that it is unconstitutionally vague. (Pet. for Cert., at 24-28.) The party asserting a void for vagueness challenge to a statute must overcome a presumption of constitutionality and prove that the statute is unconstitutional beyond a reasonable doubt. *In re CB*, 79 Wash. App. 686, 689, 904 P.2d 1171 (1995), *rev. denied*, 128 Was. 2d 1023 (1996) (citation omitted). In the context of the parental termination statute, the language in question must be unconstitutionally vague as applied. *Id.* at 689, 904 P.2d 1171. In reviewing a vagueness challenge to a provision of the parental termination statute, it is unconstitutional as applied only if the record shows that the decision reached was arbitrary. *Aschauer*, 93 Wash. 2d at 697-698, 611 P.2d 1245.

The Swensons claim that the terms "conditions" and "proper care" as they appear in Washington's parental termination law are vague. The relevant statute provides:

> That there is little likelihood that *conditions* will be remedied so that the child can be returned to the parent in the near future. A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The

> presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided. In determining whether the conditions will be remedied the court may consider, but is not limited to, the following factors:
>
> (a) Use of intoxicating or controlled substances so as to render the parent incapable of providing proper care for the child for extended periods of time and documented unwillingness of the parent to receive and complete treatment or documented multiple failed treatment attempts; or
>
> (b) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing *proper care* for the child for extended periods of time, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future[.]

Wash. Rev. Code § 13.34.180(5)(a-b) (formatting in original; emphasis & brackets added).

Initially, the vagueness challenge raised by the Swensons is not limited to the application of the parental termination statute in their case. Instead, their challenge is hypothetical and abstract. This is inadequate to demonstrate

unconstitutional vagueness. The decision to terminate the Swensons' parental rights was not arbitrary. The Swensons were informed of the unsatisfactory childrearing conditions in their home and, in fact, they apparently agreed that there were problems as they originally gave up their daughter voluntarily and subsequently stipulated to several renewed findings of dependency. They received, in the words of the Court of Appeals, a "saturation" of services designed to help them improve these conditions during the dependency and develop the ability to provide proper care for their daughter. At the time of the termination hearing, they were informed and heard testimony regarding the unsatisfactory conditions that persisted and their continued inability to provide proper care. In light of these facts, it cannot be gainsaid that the grounds for termination of the Swensons' parental rights were anything but vague.

In arguing that the terms "conditions" and "proper care" are vague, the Swensons ignore the context in which they occur. Although the portion of the statute quoted above is clear on its face, the terms contained therein must be interpreted in connection with the definition of a "dependent child," Wash. Rev. Code § 13.34.030(4)(b), which in turn incorporates the definition of "abuse or neglect" of a child, Wash. Rev. Code § 26.44.020(12). " 'Abuse or neglect' means the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child by any person under circumstances which indicate that the child's health, welfare, and safety is harmed[.]" *Id.* These definitions flesh out the meaning of unsatisfactory childrearing "conditions" and "proper care" by parents and prevent the terms from being unconstitutionally vague.

This Court has recognized that parental termination proceedings necessarily employ "imprecise substantive standards." *Santosky*, 455 U.S. at 762. The ostensibly vague terms in this case are materially identical to those repeatedly upheld against vagueness challenges. *E.g., Aschauer*, 93 Wash. 2d at 697-698, 611 P.2d at 1250; *In re JZ*, 190 N.W.2d 27, 35-36 (N.D. 1971) ("proper parental care or control"); *In re DT*, 237 N.W.2d 166, 169 (S.D. 1975) ("proper parental care"); *In re Metteer*, 279 N.W.2d 374, 377 (Neb. 1979) ("parental responsibilities" and "proper parental care"); *New Mexico ex rel. Health & Social Servs. Dep't v. Natural Father*, 598 P.2d 1182, 1185 (N.M. App. 1979) ("care or control"); *In re Gentry*, 369 N.W.2d 889, 893-894 (Mich. App. 1985) ("proper home" and "proper care and custody"). The Swensons' challenge should similarly be rejected here.

## CONCLUSION

Based on the foregoing, Mildred Staley, Guardian ad Litem for Hannah Swenson, asks the Court to deny the petition for certiorari.

Respectfully submitted,

FRANK R. HOOVER
*Counsel of Record*
GEORGE M. AHREND
*Attorneys for Respondent*
*Mildred Staley, Guardian*
*ad Litem for Hannah Swenson*
1402 West Broadway Avenue
Spokane, WA 99201-1902
(509) 328-8300